

Memorandum

November 7, 2011

To: File

From: Carol Piening

Subject: Notes from 11/4/2011 Meeting on WDFW HPA Rule Revisions

Organization representatives present:

Stephen Bernath, Washington Department of Ecology
Robert Brenner, Port of Tacoma, for Johan Hellman, Washington Public Ports Association
Van Collins, Association of General Contractors
Robert RC Cunningham, Northwest Treasure Supply
Doug Hooks, Washington Forest Protection Association
Randy Kline, Washington State Parks and Recreation Commission
Gayle Kreitman, NOAA Fisheries
Annette Pearson, Pierce County, for Gary Rowe, Washington State Association of Counties
Michal Rechner, Washington Department of Natural Resources
Ken Schlatter, WSDOT Environmental Services
Bill Thomas, Washington Prospectors Mining Association
Lance Winecka, Regional Fish Enhancement Groups
Bruce Wishart, People for Puget Sound

Interested others present:

Robert Meyer, Rayonier
Dave Molenaar, NOAA Fisheries
Rob Wenman, Pierce County SWM
Eric Wolin, WSDOT Environmental Services

Agenda Items:

Topic	Status
Process modifications	Discussed and further modified (see below)
General requirements (220-110-036)	Presented and clarifying questions answered
General construction provisions (220-110-037)	Presented and clarifying questions answered
Compensatory mitigation (220-110-038)	Presented and clarifying questions answered
Adaptive management/monitoring (220-110-039)	Presented and clarifying questions answered

Follow-ups:

- WDFW encourages participants to email their written comments at any time; it is not necessary to wait until the topic has been discussed at a stakeholder meeting.

WDFW will:

- By November 15, provide a list of definitions to be discussed on November 29.
- Post recent WDFW publications related to adaptive management on the website.

Organization Representatives and Interested Others will:

- By November 9, provide WDFW with words that should be discussed during the meeting on definitions. (Just the word, not a proposed definition).
- Provide comments to WDFW in writing when they are ready, not necessarily waiting until this series of meetings is over. (Please send to hydraulicchcp@dfw.wa.gov)

Agenda Topic Discussions

Process modifications

Jeff Davis proposed changes to the meeting schedule/overall process. After discussion, WDFW agreed to use today's meeting to present information on the specified draft rule sections and answer clarifying questions. Agendas for future meetings will include both brief presentations from WDFW staff, and policy discussion. WDFW will write a second draft for distribution in mid-January. WDFW will schedule two additional "open discussion" meetings of the second draft in mid-February, recognizing that the legislative session may take priority for many. WDFW wants input, but this is not "negotiated rulemaking."

Section overviews and clarifying questions/answers

220-110-036 General requirements

Pat Chapman and Randi Thurston summarized the highlights of WAC 220-110-036, General Requirements.

This draft moves the existing rule's "mitigation sequence" language from WAC 220-110-020 Definitions to this section, states a requirement for compensatory mitigation when impacts cannot be avoided, and details the elements that may be needed in a mitigation plan. It describes the need for a "compensation ratio" to account for the time necessary for compensatory mitigation projects to become functional habitat. It states WDFW's preference for "on-site, in-kind" compensatory mitigation, but also allows for the possibility of off-site, out-of-kind compensatory mitigation. It describes an "environmental baseline" and states that compensatory mitigation requirements apply to new projects and rehabilitation, replacement, or chronic maintenance and repair of an existing structure. Compensatory mitigation is usually not required for routine maintenance and repair.

WDFW staff also stated that a mitigation guidance document is in development and should be available for public review in the next two weeks or so.

Question: How will WDFW determine “no net loss?” Answer: the draft guidance includes a method that calculates whether or not there is a net loss. It takes into account fish life, habitat function, and habitat area.

Question: Will a ratio be required for advance mitigation? Answer: WDFW hasn’t yet discussed this in detail, but if a proponent is buying credits from a mitigation bank there should be no risk of failure so a 1:1 ratio should be enough.

Question: This is a complicated topic; is there a readers guide? Answer: the mitigation guidance includes examples, which should help, but WDFW doesn’t plan to put that level of detail into rule.

Question: In 220-110-036 (7), you are talking about mitigation for impacts to fish, and the current action, not the entire structure, correct? Answer: Correct.

Question: Will project proponents and WDFW apply the mitigation sequence first, before starting on compensatory mitigation? Answer: Yes.

Question: Will “chronic repair” be decided by local jurisdictions? Answer: The draft language came from WDFW’s Integrated Streambank Protection Guidance (ISPG). “Repairs” are minor, “rehabilitation” is structural. Chronic maintenance and repair is covered in guidance, and some WDFW biologists require compensatory mitigation for it. We would like input from stakeholders and tribes.

Question: Will the mitigation guidance be identified in the rule? Answer: No. It, and other guidance documents, are tools and are accessible on our website; they will not be included in the rule.

Question: Ecology and other agencies also have mitigation requirements. Have you checked whether terms are consistent between agencies to avoid confusion? Could a proponent use a wetland mitigation plan to meet HPA requirements? Answer: Ecology uses the same mitigation sequence; the difference is Ecology looks for no net loss of wetlands, where WDFW looks for no net loss of fish life. Whether a wetland mitigation plan could be used depends on whether it covers actions necessary to protect fish life.

Question: How did you arrive at the 1.1:1 mitigation ratio? Answer: It is there to formalize WDFW policy, which says that mitigation must be at least 1:1. As previously noted, when advance mitigation is used the uncertainty should be gone, so a higher ratio should not be necessary.

Question: Will WDFW measure no net loss on the basis of the whole HPA program, or project-by-project? Answer: WDFW calculates no net loss on a project by project basis.

Question: To what extent are you drawing from RCW? Answer: WDFW uses RCW to understand our authority. This draft sometimes incorporates RCW language; we are trying to provide more clarity.

Question: Do you want to provide more clarity to WDFW staff, to the public, or both?

Answer: Both. We want people to know what is required to protect fish life when they do a hydraulic project.

Question: How were the white papers used to develop this draft? Answer: They were one of the sources of information we used to develop the technical sections, for instance 220-110-037.

220-110-037 General construction requirements

Carol Piening summarized the highlights of 220-110-037, General construction requirements. The intention was to group commonly-required conditions here, rather than repeating them in sections for individual project types. Project proponents and WDFW biologists would use both this section and the sections for individual project types to protect fish life. Subsection (10) adds a requirement for dealing with aquatic invasive species, a growing concern. WDFW is particularly interested in input on whether the WAC should contain fish removal provisions (220-110-037 (5)(c) and/or possibly WAC 220-110-120) noise and pile driving (7), fill and piling (8), and use of explosives (9).

Question: Is there a wording conflict on sediment in section (3) and section (11)?

Answer: Yes, it appears so.

Question: When you say that all disturbed areas shall be *immediately* protected from erosion, are you looking for water quality standards or erosion control? Answer: Erosion control.

Question: Some of the proposed provisions are unclear or seem impractical. Examples that were brought up included (2)(c), (d), and (e); (5)(b); (7); and (10). Answer: WDFW is seeking input on what is practicable. Please point out these things in your comments or the upcoming policy discussion, and offer potential solutions.

Observation: The standards for noise and pile driving in (7) cannot be met. Answer: Comment noted, thank you.

Question: Do these standards apply to mineral prospecting? Answer: Yes.

Question: Will the “classes of impacts” that were part of last year’s legislative discussion be included in rule? Answer: They are not in this draft.

Question: Will the final rule use plain-talk? Answer: Yes.

Question: Why notify the military department of a fish kill? Is this any fish kill, or only those related to the project? Answer: They are the state’s official first responder. While we hope people would report fish kills they observe, this requirement is for fish kills related to the project.

220-110-038 Compensatory mitigation monitoring requirements

Randi Thurston described the function of this section: monitoring requirements for the compensatory mitigation described in 220-110-036. Monitoring is the last step of the mitigation

sequence. It is typically part of a mitigation plan, and can be part of a mitigation agreement. It answers the questions who is going to monitor? What are the performance standards to be met? What are the reporting requirements?

Question: Is there a rating system? Answer: it is a scoring system, not totally based on mitigation ratios.

Question: Will the monitoring plan be part of the HPA? Answer: Yes; it will be cited in the HPA when one is required. However, monitoring plans are not always required; it depends on the complexity of the project and the certainty of success.

Question: What do you mean by “qualified professional”? Answer: Mitigation monitoring plans typically specify who will be doing the monitoring in the field, with the goal of assuring that the person has the expertise and training necessary to do the monitoring successfully.

Question: Will this kind of monitoring apply to prospectors? Answer: Probably not.

220-110-039 Adaptive management for the HPA program

Randi Thurston described the adaptive management program. WDFW’s intention is to describe the framework, but not the specifics, in rule. We want to change adaptive management as needed based on new information, without necessarily having to go through rulemaking.

Question: Why put this in rule as opposed to an internal operating procedure? Answer: We want to be clear and consistent, hold ourselves accountable to do our job better, and commit to having an external committee to advise us about how to make changes.

Question: Do you know how you will measure the components of adaptive management or how the committee will be organized, selected, and convened? Answer: Not yet. We think the most important question is when will they convene? It would be in response to a problem identified through compliance and effectiveness monitoring data.

Comment: Be careful about mixing compliance and effectiveness; you can’t measure effectiveness if the structure/action is not in compliance. Answer: It may be better to identify two tracks, one for compliance and one for effectiveness.

Comment from WDFW: The reason to do adaptive management is to foster process improvement – to obtain the information that allows the program to get better results through time. This is a commitment regardless of the results of upcoming HCP negotiations.

Items for WDFW to consider:

220-110-036

- Consider whether/how project proponents will know about the existence and the content of WDFW guidance documents.

- Discuss “no net loss,” including whether it should be measured on a project-by-project basis or taking into account the HPA program as a whole.
- Consider the wording of the invasive species provisions; a project proponent who is not familiar with aquatic species won’t know if they are complying with this provision or not.

220-110-038

- Consider dropping 220-110-038 as redundant, or reorganizing to include with the discussion of mitigation in 220-110-036.

Definitions/clarifications needed:

- “No net loss”
- “Fish life”
- “Near” (as in “near waters of the state”)
- “Site specific” and “project specific”
- “Qualified professional” responsible for monitoring

Marina/Parking Lot

- Policy discussions for the sections reviewed today.
- Definitions discussions.